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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

FRANK MORGAN and JANET HOOD,
individually and on behalf of all others similarly
situated,

Plaintiffs,

V.

WALLABY YOGURT COMPANY, INC.,

Defendant.

Case No. 13-0296-CW

**PLAINTIFFS' OPPOSITION TO
DEFENDANT'S REQUEST FOR
JUDICIAL NOTICE IN SUPPORT OF ITS
MOTION TO DISMISS**

Hearing Date: July 11, 2013
Time: 2:00 p.m.
Judge: Hon. Claudia Wilken
Action Filed: January 22, 2013

1

PLAINTIFFS' OPPOSITION TO DEFENDANT'S
 2 **REQUEST FOR JUDICIAL NOTICE**

3 **I. INTRODUCTION**

4 Plaintiffs oppose Defendant's Request for Judicial Notice in Support of Defendant's Motion
 5 to Dismiss ("Request") on the grounds that the documents they seek to judicially notice do not
 6 remotely satisfy the strict prerequisites contained in Rule 201 of the Federal Rules of Evidence: the
 7 information is not generally known, and it is not capable of accurate determination by sources whose
 8 accuracy cannot be reasonably questioned, nor is the information contained therein "immediately
 9 ascertainable by resort to sources of reasonably indisputable accuracy," as required under California
 10 law. *See* Evid. Code §452(h); *Lockley v. Law Office of Cantrell, Green, Pekich, Ruz & McCort*, 91
 11 Cal. App. 4th 875, 882 (2001); Jefferson, Cal. Evidence Benchbook, Judicial Notice §49.5 (4th ed.
 12 2009). Defendant's Request should be denied because (1) the facts underlying the exhibits are not
 13 suitable for judicial notice, (2) they are not reasonably beyond dispute, (3) even if judicially
 14 noticeable or otherwise provable, these facts are irrelevant.

17 Federal Rule of Evidence 201, which governs judicial notice, provides that "[a] judicially
 18 noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known
 19 within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination
 20 by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).
 21 Where factual findings or the contents of the documents are in dispute, those matters of dispute are
 22 not appropriate for judicial notice. *See Daresburg v. Metropolitan Transp. Comm'n*, 2006 WL
 23 167657, *2 (N.D. Cal., Jan. 20, 2006) (citing *Del Puerto Water Dist v. U.S. Bureau of Reclamation*
 24 271 F. Supp. 2d 1224, 1234 (E.D. Cal., 2003).

26 Defendant's Request misconstrues the nature and purpose of "judicial notice" under Federal
 27 Rule of Evidence 201. "The Rule was intended to obviate the need for formal fact-finding as to
 28 certain facts that are *undisputed and easily verified.*" *Walker v. Woodford*, 454 F. Supp. 2d 1007,
 1022 (S.D. Cal. 2006) (emphasis added). The Ninth Circuit "tends to be strict with its application of

1 Rule 201(b)." *Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1311. The rule is characterized by
 2 "[a] high degree of indisputability [as] the essential prerequisite to taking judicial notice of
 3 adjudicative facts." Advisory Committee Notes to Fed. R. Evid. 201 (a) & (b). "Because the effect
 4 of judicial notice is to deprive a party of an opportunity to use rebuttal evidence, cross-examination,
 5 and argument to attack contrary evidence, caution must be used in determining that a fact is beyond
 6 controversy under Rule 201(b))." *Rivera v. Philip Morris, Inc.*, 395 F. 3d 1142, 1151 (9th Cir.
 7 2005). "As Rule 201(b) teaches, judges may not defenestrate established evidentiary processes,
 8 thereby rendering inoperative the standard mechanisms of proof and scrutiny [through judicial
 9 notice], if the evidence is at all vulnerable to reasonable dispute." *Lussier v. Runyon*, 50 F. 3d 1103,
 10 1115 (1st Cir. 1995).

11 **II. ANALYSIS**

12 Defendant's request judicial notice of two general categories of documents: (1) Defendant's
 13 own label "Proofs" (Exhibits 1-3); (2) Letters to FDA from *non-parties* (Exhibits 4-5). The
 14 proffered exhibits fall far beyond the bounds of what is appropriate for judicial notice, and notably,
 15 for each of the exhibits presented, Defendant fails to allege which specific facts contained therein are
 16 actually beyond dispute and subject to judicial notice. As the information is either not beyond
 17 reasonable dispute, actually disputed, or irrelevant, it cannot serve as a piece of uncontested *evidence*
 18 to be considered at this stage of litigation, which is what Defendant seeks to do with this Request.

19 **III. PLAINTIFFS' OBJECTIONS TO DEFENDANT'S REQUEST FOR JUDICIAL**
 20 **NOTICE EXHIBIT 1**

21 Plaintiffs object to Defendant's Request for Judicial Notice Exhibit 1 on the basis and to the
 22 extent that Exhibit 1 is not the actual label of the Wallaby Organic Vanilla Low Fat Yogurt, 6 oz.
 23 size of the type purchased by Plaintiffs. Instead, it is a label "proof" for the 32 oz container of said
 24 vanilla product. Plaintiffs further object to Exhibit 1 in that ingredients statement of this 32 oz. label
 25 "proof" contains "organic cane sugar" which is different from the 6 oz label of Wallaby's Organic
 26 Low Fat Yogurt Vanilla flavor which list the ingredient "evaporated cane juice".

27 Finally, Plaintiffs object to Defendant's Request for Judicial Notice of Exhibit 1 in that it

1
2 does not indicate the date or time period, if any, that said label “proof” was actually used on any
3 container of Wallaby Organic Low Fat Vanilla Yogurt.

4 **IV. PLAINTIFFS’ OBJECTIONS TO DEFENDANT’S REQUEST FOR JUDICIAL**
5 **NOTICE EXHIBIT 1**

6 Plaintiffs object to Defendant’s Request for Judicial Notice of Exhibit 2 on the basis that said
7 exhibit is not the actual label on any container of Wallaby Organic Vanilla Low Fat Yogurt,
8 Strawberry flavor. Instead, it is a label “proof”. Plaintiffs further object that it is impossible to
9 determine when, if ever, said label proof was actually used on any container of Wallaby Yogurt.

10 **V. PLAINTIFFS’ OBJECTIONS TO DEFENDANT’S REQUEST FOR JUDICIAL**
11 **NOTICE EXHIBIT 3**

12 Plaintiffs object to Defendant’s Request for Judicial Notice of Exhibit 3 on the basis that said
13 exhibit is not the actual label on any container of Wallaby Organic Vanilla Low Fat Yogurt,
14 Blackberry flavor. Instead, it is a label “proof”. Plaintiffs further object that it is impossible to
15 determine when, if ever, said label proof was actually used on any container of Wallaby Yogurt.

16 **VI. PLAINTIFFS’ OBJECTIONS TO DEFENDANT’S REQUEST FOR JUDICIAL**
17 **NOTICE EXHIBIT 4 and 5**

18 Plaintiffs object to Defendant’s Request for Judicial Notice of Exhibit 4 and 5 on the basis
19 that what Defendant calls “official comments” are not comments of the FDA and are not a part of the
20 FDA Draft Guidance. They are comments received from the public—mostly from the food industry
21 complaining about the FDA’s interpretations of its own regulations—and are not in any sense an
22 official statement from the FDA. These comments are not a proper subject of judicial notice. “The
23 court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally
24 known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined
25 from sources whose accuracy cannot reasonably be questioned.” FED. R. EVID. 201(b). While the
26 Court could take judicial notice of the fact that comments were filed, the contents of those comments
27 are not judicially noticeable because they do not come from sources whose accuracy cannot
28 reasonably be questioned. “Facts that are subject to dispute are properly denied judicial notice even
if they appear in government reports and other government documents.” 1-201 WEINSTEIN’S

1 FEDERAL EVIDENCE § 201.13(1)(c). Defendant asserts that letters *to* the FDA are proper subjects of
2 judicial notice based on cases taking judicial notice of letters *from* a federal agency. *See Batwin v.*
3 *Occam Networks, Inc.*, No. CV 07-2750 CAS (SHx), 2008 U.S. Dist. LEXIS 52365 at *5 n.3 (C.D.
4 Cal. July 1, 2008) (taking judicial notice of a correspondence letter from the SEC to defense
5 counsel); *Jones*, 2012 U.S. Dist. LEXIS 178352 at *24 n.6 (taking judicial notice of letter from the
6 FDA). As the court said in *Batwin*, the truth of the contents of documents filed with the agency is not
7 a proper subject for judicial notice. *See Batwin*, 2008 U.S. Dist. LEXIS 52365 at *5 n.3 (refusing to
8 take judicial notice of truth of contents of SEC filings). Since the comments are offered for no other
9 purpose than their truth, they are not judicially noticeable and not relevant.

10
11 **VII. CONCLUSION**

12 The Court should deny Defendant's request for judicial notice pursuant to Federal Rule of
13 Evidence 201.

14 Dated: May 22, 2013.

15 Respectfully submitted,

16
17 */s/ Darren L. Brown*
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CERTIFICATE OF SERVICE

I hereby certify that I have on May 22, 2013, filed and served through the Court's ECF system a true and correct copy of the foregoing.

/s/ Darren L. Brown

Darren L. Brown (*pro hac vice*)